

Claimant alleges that on June 7, 2012, she injured her right shoulder in a work-related accident when she was pulling a demonstration case out of a trunk. Claimant reported the accident to respondent the next day and set up an appointment for medical treatment on her own. She was not able to obtain an appointment until July 2, 2012, when she saw Dr. Joshua D. Nelson. From July 2, 2012, through August 12, 2012, Dr. Nelson restricted claimant to lifting no more than five pounds, but indicated she could return to accommodated work. From August 13, 2012, through August 21, 2012, Dr. Nelson took claimant completely off work. Beginning August 22, 2012, Dr. Nelson allowed claimant to return to accommodated work if she lifted no more than 15 pounds.

Claimant filed for a preliminary hearing, where she requested temporary total disability (TTD) benefits. Respondent acknowledged claimant is entitled to TTD benefits for the period of August 13, 2012, through August 21, 2012, but not from June 7 through August 12, 2012, or from August 22, 2012, thereafter because it offered claimant accommodated employment, but she refused the accommodated job. The ALJ determined claimant failed to prove that the injuries she sustained on June 7, 2012, prevented her from performing the lighter work offered by respondent before a physician imposed restrictions. The ALJ denied claimant's request for TTD benefits until she saw an authorized physician on July 2, 2012. The ALJ then denied claimant TTD benefits from July 2 through August 12, 2012, and from August 22, 2012, thereafter as respondent previously offered claimant a position that accommodated her restrictions. Claimant appeals and argues she did not refuse accommodated work. Respondent contends the Board does not have jurisdiction to review the ALJ's Order.

The issues before the Board are:

1. Does the Board have jurisdiction to review whether the ALJ erred in denying claimant's request for TTD benefits from June 7 through August 12, 2012, and from August 22, 2012, thereafter? Specifically, does the Board have jurisdiction to review the underlying issue of whether claimant refused respondent's offer of accommodated work?
2. If so, did claimant refuse an offer by respondent to return to accommodated work, thus disqualifying claimant from receiving TTD benefits from June 7 through August 12, 2012, and from August 22, 2012, thereafter?

FINDINGS OF FACT

After reviewing the record compiled to date and considering the parties' arguments, the undersigned Board Member finds and concludes:

The ALJ's September 11, 2012, Order sets out findings of fact that are detailed, accurate and supported by the record. It is not necessary to repeat those findings and conclusions herein.

PRINCIPLES OF LAW AND ANALYSIS

K.S.A. 2011 Supp. 44-534a(a)(2) states in part:

Upon a preliminary finding that the injury to the employee is compensable and in accordance with the facts presented at such preliminary hearing, the administrative law judge may make a preliminary award of medical compensation and temporary total disability compensation to be in effect pending the conclusion of a full hearing on the claim, except that if the employee's entitlement to medical compensation or temporary total disability compensation is disputed or there is a dispute as to the

compensability of the claim, no preliminary award of benefits shall be entered without giving the employer the opportunity to present evidence, including testimony, on the disputed issues. A finding with regard to a disputed issue of whether the employee suffered an accident, repetitive trauma or resulting injury, whether the injury arose out of and in the course of the employee's employment, whether notice is given, or whether certain defenses apply, shall be considered jurisdictional, and subject to review by the board. Such review by the board shall not be subject to judicial review. If an appeal from a preliminary order is perfected under this section, such appeal shall not stay the payment of medical compensation and temporary total disability compensation from the date of the preliminary award. If temporary total compensation is awarded, such compensation may be ordered paid from the date of filing the application, except that if the administrative law judge finds from the evidence presented that there were one or more periods of temporary total disability prior to such filing date, temporary total compensation may be ordered paid for all periods of temporary total disability prior to such date of filing. The decision in such preliminary hearing shall be rendered within five days of the conclusion of such hearing. Except as provided in this section, no such preliminary findings or preliminary awards shall be appealable by any party to the proceedings, and the same shall not be binding in a full hearing on the claim, but shall be subject to a full presentation of the facts.

K.S.A. 2011 Supp. 44-534a(a)(2) states that a finding or preliminary award of TTD benefits is not subject to review by the Board. At the preliminary hearing, respondent advised it would not dispute any other issues other than the issue of TTD benefits and that it was reserving any compensability defenses for later. Therefore, respondent is not asserting that: (1) claimant failed to prove she sustained either an accident or an injury by repetitive trauma arising out of and in the course of her employment with respondent, (2) timely notice was not given or (3) certain defenses apply. This Board Member finds that K.S.A. 2011 Supp. 44-534a(a)(2) does not grant the Board jurisdiction to review the ALJ's denial of TTD benefits from June 7 through August 12, 2012, and from August 22, 2012, thereafter.

Claimant asserts the ALJ exceeded his authority in finding claimant was not entitled to TTD benefits from June 7 through August 12, 2012, and from August 22, 2012, thereafter and, therefore, pursuant to K.S.A. 2011 Supp. 44-551(i)(2)(A), the Board has jurisdiction to consider that issue. However, merely asserting the ALJ exceeded his or her authority does not make it so. Whether the administrative law judge should, in a given set of circumstances, authorize TTD compensation is not a question that goes to the jurisdiction of the administrative law judge. K.S.A. 2011 Supp. 44-534a(a)(2) specifically grants an administrative law judge the authority to decide at a preliminary hearing issues concerning the payment of TTD compensation. Simply stated, the ALJ did not exceed his jurisdiction. Accordingly, the Board does not have jurisdiction to address this issue at this juncture of the proceedings.

By statute the above preliminary hearing findings are neither final nor binding as they may be modified upon a full hearing of the claim.¹ Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2011 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board when the appeal is from a final order.²

CONCLUSION

When the record reveals a lack of jurisdiction, the Board's authority extends no further than to dismiss the action.³ Accordingly, claimant's appeal is dismissed.

WHEREFORE, the undersigned Board Member finds that claimant's appeal of the September 11, 2012, Order entered by ALJ Belden is dismissed for lack of jurisdiction.

IT IS SO ORDERED.

Dated this ____ day of November, 2012.

THOMAS D. ARNHOLD
BOARD MEMBER

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¹ K.S.A. 2011 Supp. 44-534a.

² K.S.A. 2011 Supp. 44-555c(k).

³ See *State v. Rios*, 19 Kan. App. 2d 350, Syl. ¶ 1, 869 P.2d 755 (1994).